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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GUARDIAN PLANS, INC. *et al.*,
Petitioners,

v.

JOSEPH W. TEAGUE, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Circuit's decision that Virginia may prohibit uninvited telephone solicitation to older consumers in their homes for the sale of funerals, when ample other means of promotion are permitted, is worthy of review?

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STATEMENT OF THE CASE

The Commonwealth of Virginia regulates the practice of the funeral service profession by statute and through a regulatory board, the Board of Funeral Directors and Embalmers ("the Board"), whose members include licensed funeral directors and consumer representatives. The Board promulgates and enforces regulations governing licensure and professional standards for the practice of the funeral profession in Virginia.

Virginia's regulations include restrictions upon commercial promotion of funerals for both at-need and pre-need funeral planning. While § 54-260.74(2) of the Virginia Code and Board regulation (Article XVIII of Board Regulations) prohibit personal solicitation of funeral services, other forms of advertising are permitted. The ban on personal solicitation is designed to reduce the opportunities for fraud or overreaching and to respect consumer privacy in the sensitive and emotional matters involved in funeral planning.[1]

Petitioner Guardian Plans, Inc. ("Guardian") is a corporation whose agents market the Guardian Plan© ("the Plan"), an insurance funded pre-arranged funeral program. Petitioners Tharp and Rogers are Virginia licensed funeral directors who allege that they are aggrieved by the ban on solicitation. Both operate funeral homes which sponsor the Plan. Respondents are members of the Board, the Director of the Virginia Department of Health Professions (formerly Department of Health Regulatory Boards) and the Virginia Funeral Directors Association ("VFDA"), which intervened as a party defendant at the trial level.

Guardian markets the Plan to consumers in Virginia by "sales counselors" and telemarketers, who are generally not qualified by education or license to practice the funeral profession in Virginia. Sales counselors are licensed to sell life insurance and annuities, which are the funding vehicles for the Plan. Guardian telemarketers are trained only in techniques of persuasion by telephone; they are neither trained nor licensed to sell insurance or to practice the funeral profession.

Guardian promotes its Plan in Virginia by print and broadcast media, by direct and targeted mailings, and , prior to the decision in this case, by telemarketing to private homes. Guardian mails promotional pamphlets for the Plan to targeted consumers, using purchased lists of individuals selected by zip code and age. This targeted group consists of

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[1] Contrary to Petitioners' assertions, these legitimate state interests underlying the regulation were articulated by members of the Board at trial.

persons aged 50 or above living in zip code areas near the funeral homes which endorse (and ultimately provide the funerals arranged pursuant to) the Plan.

Guardian's promotional pamphlet invites consumers to obtain additional information about the Plan by returning a postage-paid response card. Those targeted consumers who do *not* respond to the mailer received "follow-up" telephone calls in their homes from Guardian phone solicitors, who tried to persuade them to accept a home visit by a Guardian sales counselor.

During a home visit, the Guardian sales counselor tries to arrange a funeral for his prospect, selling life insurance or annuity contracts to fund it. The sales counselor has been trained to give a structured sales presentation using a variety of "closing techniques" designed to remove objections to the sale. If he is successful in his sales pitch, he arranges all details of the consumer's funeral. The sum total of the prices of the funeral goods and services selected determines the amount of death benefit of the insurance policy. Next, the consumer signs a revocable assignment of death benefit to Guardian, which then forwards the contract papers to the sponsoring funeral home. Upon the death of the consumer, the funeral home provides the funeral in return for the insurance proceeds.

Guardian's marketing and funeral arrangement scheme prompted an investigation by the Board into whether Guardian was violating Virginia law by engaging in personal solicitation of Virginia consumers for its pre-need funeral program and by using employees unlicensed in the funeral profession to arrange funerals.

Petitioners challenged the Board's position on solicitation and licensing on constitutional grounds in federal court, losing at both trial and appellate levels. The issue raised by this petition is whether this Court should review the Fourth Circuit's decision finding that the Virginia ban on telephone solicitation for pre-need funerals is permissible under the First Amendment and that the Virginia law mandating that ban is not unconstitutionally vague.

SUMMARY OF ARGUMENT

Petitioners do not raise any significant issue which has not already been addressed by this Court. The lower courts correctly decided the constitutional issues in applying the four-part test applicable to commercial speech articulated by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

Indeed, the appellate court's rejection of Petitioners' argument that the ban on solicitation be judged by the "least restrictive alternative" accords with a recent decision of this Court. Another recent decision of this Court renders immaterial the issue whether the Virginia statute should be viewed as a content-based restriction on commercial speech or as a content-neutral "time, manner and place" restriction.

There can be no rigid formula for the state's evidentiary burden in defending a particular restriction upon commercial speech. Each form of commercial speech is unique; because of the inherent dangers of some forms of communication, the state may support a restriction with little or no formal evidence. Moreover, in this case, Respondents presented evidence that Guardian's solicitation threatened abuse of targeted consumers. The prohibition of that solicitation is a reasonable regulation narrowly tailored to eliminate that threat while permitting Guardian to use other means of promoting its product.

ARGUMENT: REASONS FOR DENYING THE WRIT

1. Petitioners Fail to Raise Any Significant Issue Which Has Not Been Addressed by this Court

This petition should be denied for the simple reason that it raises no significant constitutional issue that has not been already addressed by this Court. Petitioners asked the appellate court to reconsider its ruling approving the ban on solicitation because of a disagreement among the judges: two upheld the restriction on different legal grounds and the third dissented. Judge Hall found the ban acceptable under the *Central Hudson* analysis applicable to content-based restrictions upon commercial speech. Judge Kiser, concurring in the result, found the ban valid under a "time, place and manner" analysis. Judge Butzner dissented.

The disagreement between Judges Hall and Kiser concerning the appropriate analytical model is immaterial in light of this Court's very recent decisions in *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879, No. 88-226 (June 22, 1989), and *Board of Trustees v. Fox*, 57 U.S.L.W. 5015, No. 87-2013 (June 29, 1989). *Ward* involved a challenge to a governmental "time, place or manner" restriction on public rock music concerts, while *Fox* concerned a content-based restriction upon commercial speech.

In both cases, the Court found that it was unnecessary for the government to select the least restrictive alternative; this standard is

required only for prohibitions applicable to non-commercial speech. Furthermore, the standards of judicial review in *Ward* (for time, place and manner restriction) and *Fox* (for commercial speech) are indistinguishable: the restriction must be narrowly tailored to promote legitimate governmental objectives, but need not be the least restrictive means of accomplishing those objectives. Because the two standards are virtually identical, whether Virginia's restriction on commercial solicitation of funerals is "content-based" or "content-neutral" is immaterial.

Guardian also argued to the Fourth Circuit that its panel erred in not adopting the "least restrictive means" analysis to the Virginia solicitation ban. *Fox* removes any doubt of the correctness of the appellate court's choice for the appropriate standard of review.

After *Ward* and *Fox*, Petitioners have no legitimate issue worthy of review. Thus, they now must manufacture such issues, described as follows:

> (1) What factors are used in determining if a restriction on commercial speech is content-based or content-neutral?
>
> (2) What evidence must a state present to justify a content-based prohibition on truthful commercial speech?
>
> (3) To what extent does the First Amendment protect telemarketing, which is an increasingly common means of disseminating commercial information, but which the Court has never addressed?
>
> (4) How do the First Amendment principles governing lawyer solicitation or door-to-door solicitation apply to this form of marketing?

(Petition at p. 2).

The first "issue" is immaterial in the context of commercial speech as discussed above. Furthermore, it has been addressed repeatedly by this Court. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There is no confusion about the relevant factors to be considered in determining whether a regulation is "content-based"; there is only disagreement about how those factors apply to particular facts.

The second issue is also a "non-issue," because there can be no rigid formula for the state's evidentiary burden to defend its restrictions on commercial speech; there are too many variables, including the type and manner of speech, strength of the state's interests and availability of

alternatives. As this Court noted in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981):

> each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.

The decision of this Court in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (upon which both the trial and appellate courts relied heavily in this case), illustrates this point.[2] In *Ohralik*, Ohio successfully defended its ban upon lawyer solicitation without showing any actual harm from such solicitation. The Court, in effect, took judicial notice of the potential for overreaching and misconduct inherent in personal solicitation, particularly of vulnerable consumers, and ruled that the state could take prophylactic measures. By contrast, the Court held that the state had not met its burden to show that a regulation was sufficiently "narrowly tailored" in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. ____, 108 S.Ct. 1916 (1988), where mailed advertisements for legal services were banned. While the state's evidentiary burden varied in these cases, the standard for reviewing the restrictions did not.

Judicial approval of prohibitions against telemarketing of funeral services does not represent a threat to telemarketing generally. As the appellate court found, the ban on Guardian's telemarketing is justified because of (a) the potential for overreaching inherent in personal telephone solicitation for funeral planning, a unique topic which "is obviously one charged with emotion and one fraught with the potential for overreaching by solicitors" (Appendix to Petition at C-10) and (b) the "substantial interest of protecting privacy" in matters so personal and disquieting as one's death (Appendix to Petition at C-11). Only funeral solicitation is affected by these cases, not telemarketing *per se*.[3] Accordingly, Petitioners are wrong to suggest that this case creates the need for the Court to address the First Amendment's application to telemarketing.

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[2] Petitioners try to avoid the impact of *Ohralik* by suggesting that it is limited to regulation of the legal profession (Petition at 12). This contention is belied, of course, by the frequent citation of *Ohralik* by this and lower courts in other First Amendment decisions.

[3] As Petitioners note, Virginia does not restrict telemarketing for other commercial purposes. Funeral solicitation has been singled out because of its particular potential for harm.

Similarly, Petitioners' argument that the Court should spell out the relationship between lawyer solicitation, charitable solicitation and telemarketing misses the point. Each case involving the First Amendment is unique. The restrictions on lawyer solicitation in *Ohralik* reflect an appropriate balance between the potential for harm to the consumer and the speaker's right to communicate. A similar balancing analysis was made in this case, and in every First Amendment case. The legal principles applied in this balancing process are now well-established and this case raises no new issue requiring further clarification.

To compare "lawyer solicitation" cases with "charitable solicitation" cases or "funeral solicitation" cases is not particularly helpful for purposes of First Amendment analysis. *Ohralik* is important precedent for these funeral solicitation cases not because of similarities between the regulation of lawyers and funeral directors, but because the underlying concerns justifying the result in *Ohralik* are applicable herein. Both cases involve purely commercial speech that is inherently conducive to abuse (personal contact by skilled solicitors of consumers susceptible to overreaching). Furthermore, in each case, there are alternative, less intrusive means of conveying the same commercial message.

Significant for First Amendment review are general guiding principles, such as the means by which particular speech is determined to be "commercial" or "political", and the criteria by which limitations upon each category of speech are to be judged. *Central Hudson* provides the four-prong test by which restrictions upon *all* commercial speech are to be judged. *Fox* simply refines that test by adding clarity to the meaning of the fourth prong of that test (the "narrowly tailored" requirement). Nothing in this case suggests that any further refinement of the *Central Hudson* formulation is needed.

2. The Majority Opinion of the Fourth Circuit Court of Appeals Applied the Correct Legal Analysis in Sustaining Virginia's Right to Prohibit Personal Solicitation of Pre-need Funerals

The Fourth Circuit Court of Appeals upheld the Virginia statute by comparing it to a nearly identical restriction on pre-need funeral solicitation of a West Virginia statute in the companion case of *National Funeral Services v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989). The appellate court's review of both statutes followed the four-prong test of *Central Hudson*. The court, although finding that (1) Guardian's

commercial speech was entitled to some degree of First Amendment protection, also determined that (2) the state's interest in banning pre-need solicitation was substantial; (3) the ban furthered those interests; and (4) the ban was narrowly tailored in proportion to those interests.

In applying the fourth prong of *Central Hudson*, the appellate court rejected Petitioners' argument that it must use the "least restrictive means" standard. Instead, the court upheld the statutes on a finding that they represented "a reasonable means of regulation that is not excessive in view of [the state's] legitimate interests." (Appendix to Petition at C-14). This analysis is consistent with that approved by this Court in *Fox*: a restriction must be narrowly tailored in proportion to the interest served, but need not be a "perfect fit." 57 U.S.L.W. at 5018. Because the appellate court applied the correct legal standard, its decision should not be disturbed.

3. The Record Herein Provides Ample Factual Support for the Prohibition of Guardian's Telemarketing Solicitation

Petitioners make the startling assertion that the Fourth Circuit did not cite any governmental interests served by the Virginia law. This statement is true only in the literal sense that the opinion in *Guardian Plans, Inc. v. Teague*, 870 F.2d 123 (4th Cir. 1989), did not address the Virginia statute separately from the West Virginia statute approved in the companion *National Funeral Services* case. No separate analysis was made of the Virginia law because the court found the two forms of solicitation (and related bans) so similar "there can be no principled analytical distinction." (Appendix to Petition A-7).

In *National Funeral Services*, the court identified as substantial the state's interests in consumer protection against fraud, overreaching and uninvited intrusions into the privacy of the home. The importance of these interests has been recognized in *Ohralik*,[4] wherein the Court approved a ban on personal, in-hospital solicitation by attorneys. The analogy is appropriate: in both situations, the opportunity for coercion inheres in the nature of the promotion—personal contact of a particularly vulnerable consumer by one who is trained to persuade. Because of Guardian's offering (funeral goods and services) and the age of its targeted consumers (over 50), the risk of overreaching is obviously greater than, for example, the selling of housewares to a homeowner.

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[4] This Court's recognition of the importance of the right to privacy in the home is evidenced in *Frisby v. Schultz*, ____ U.S. ____, 108 S.Ct. 2495 (1988).

Although the lower courts did not find it necessary to scour the record to identify these interests in *Guardian*, there was testimony from Board members identifying the reasons for the prohibition.[5]

Guardian also claims that there was "no credible evidence that telemarketing solicitation of pre-need funeral plans has or might coerce consumers" (Petition at 15), but the trial evidence shows otherwise. What is particularly suspect about Guardian's telemarketing is that it has no informational value. Guardian's telemarketers phone only those individuals who have received its informational brochure in the mail and who have chosen *not* to return its response card to ask for more information. They are, therefore, presumptively not interested in Guardian's product. The sole role of the telemarketers is to get a home appointment for a salesman, not to inform.[6] What the telemarketers are trained to do is to deflect consumers' objections to a home visit by a Guardian salesman. These and other selling techniques revealed in the record of this case amply support the restriction.

Moreover, Guardian is wrong again in implying that its telemarketing is harmless. Common sense suggests that telephone solicitation by persuasive telemarketers for funeral plans directed to consumers over 50 years of age has the same potential for abuse as that identified in *Ohralik*. The record supports that conclusion.

At trial, Respondents introduced Virginia consumer letters (from Guardian's files) demonstrating possible overreaching by Guardian's telemarketing. One letter is from a daughter of an elderly and mentally incompetent woman who "purchased" the Plan. Others claim or imply that Guardian representatives misled them.[7] The record shows that Guardian's telemarketing raises valid concerns and is appropriately subject to state regulation.

The next issue under *Central Hudson* is whether the challenged regulation furthers the state's interests. There is no question that the prohibition of telemarketing furthers the state's interest in protecting consumers from overreaching and unwanted intrusions into the privacy of their homes: elimination of the phone calls (which, as in *Ohralik*, are

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[5] For example, Susan Modlin, a consumer member of the Board, testified the ban was necessary because discussion of funerals raises personal and emotional issues which can render the consumer subject to manipulation. (Joint Appendix filed with the appellate court, Tab 16 at 204).

[6] Guardian trains its telemarketers to "never tell the prospect too much. Give the person just enough information to get the appointment. Questions will be answered by the counselor." (Defendants' Trial Exhibit 14 filed under protective order.)

[7] Consumer complaint letters appear at Joint Appendix, Tabs 58-61, at 727-31.

not subject to public scrutiny) removes the potential for abuse inherent in such telemarketing.

The final prong of the *Central Hudson* analysis requires the restriction to be narrowly tailored to serve the state's interests. Guardian promotes its Plan in other ways, free of state regulation, using both print and broadcast media and targeted mailings. There is no indication that these means of promotion are ineffective. Furthermore, as in *Ohralik*, there is simply no feasible means of policing personal solicitation short of a ban. Accordingly, the lower courts appropriately found the prohibition of telemarketing to be within the state's authority. Common sense, human experience and evidence in the record combine to provide ample factual support for the appellate court's decision.

4. Virginia's Statutory Ban on Pre-Need Funeral Solicitation is Not Unconstitutionally Vague

As the majority opinion of the appellate court noted, Petitioners themselves provide the best defense to their argument that § 54-260.74(2) of the Virginia Code (the law which prohibits solicitation of funerals) is unconstitutionally vague. Their original complaint contained no hint of confusion about the meaning of the statute. In responding to a motion for abstention, Petitioners explicitly acknowledged their understanding that Guardian's solicitation was illegal:

> The statute rendering solicitation illegal (Va. Code § 54-260.70) is clear and unambiguous. There is *no* dispute about its meaning, and therefore abstention is completely inappropriate.

(emphasis in original) (*See* opinion below at Appendix to Petition, A-7, n. 5).

Any doubt concerning the legality of solicitation was dispelled by the 1989 Virginia General Assembly, which enacted § 54.1-2806(5) of the Virginia Code. That section explicitly prohibits both at-need and pre-need funeral solicitation.[8]

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[8] The 1989 Virginia General Assembly also answered Guardian's complaint of a lack of "legislative findings" to support the ban. In 1988, the Virginia General Assembly approved House Joint Resolution 50, which established a legislative subcommittee to study the laws related to pre-need funeral contracts and to recommend (among other

(Continued on next page.)

CONCLUSION

This petition raises no novel question of constitutional significance. Whatever conflicts which may have existed among the circuits have been resolved by several recent decisions of this Court further defining the scope of permissible state restrictions upon protected speech. The lower courts herein applied the correct legal standards to facts supported by the record.

Guardian's intrusive and uninvited solicitation for funeral goods and services by telemarketers to older consumers in their homes is entitled to little or no First Amendment protection. The Commonwealth of Virginia has substantial interests in suppressing the potential for abuse inherent in such solicitation, and in protecting the privacy of its citizens in their homes. Considering that Guardian can and does promote its product in other ways, the ban upon solicitation by telemarketers is narrowly tailored and does not offend the First Amendment. Accordingly, Respondents ask that this petition be denied.

Respectfully submitted,

MEMBERS, VIRGINIA BOARD
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* *(Continued from previous page.)* things) whether the "solicitation of pre-need contracts [should] continue to be prohibited as provided in the present law?" That subcommittee presented its written report to the 1989 General Assembly in a document titled *Pre-need Contracts for Funeral Services* [House Document No. 52 (1989)]. The report unanimously recommended that the solicitation ban be retained and the law clarified. It recited consumer protection, particularly for elderly consumers, as a primary concern in regulating pre-need funeral contracts.

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